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No. 92-817

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SOLDIER OF FORTUNE MAGAZINE, INC. and OMEGA GROUP, LTD.,
Petitioners,

v.

MICHAEL F. BRAUN and IAN BRAUN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Movant, The National Rifle Association of America (NRA) is a New York not for profit corporation. It was founded in 1871 by former officers of the Union Army with the purpose of promoting rifle marksmanship. Currently the NRA has 2.96 million members.

NRA publishes several periodicals for the benefit of its members, including *American Rifleman, American Hunter, InSights* for junior members, and *Shooting Sports USA* for competitive shooters. The interest of NRA in this petition is derived from its status as a publisher.

NRA has sought permission, from Counsel for the Respondent, to file a brief as *amicus curiae.* This permission was denied. NRA believes that its brief may bring relevant matter to the attention of this court which has not already been brought to its attention.

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THE QUESTION PRESENTED

Does the First Amendment require, before crippling damages are imposed upon a publisher, that a third-party advertisement clearly and on its face solicit criminal conduct, or is it sufficient, as held by the court of Appeals for the Eleventh Circuit that the advertisement can be read as posing a substantial risk of harm to the public?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICUS CURIAE*	1
REASONS FOR GRANTING THE WRIT	2
STATEMENT OF THE CASE	4-7
DISCUSSION	7-17
I. THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS ESTABLISHED AN AMBIGUOUS THRESHOLD TEST TO IMPOSE LIABILITY ON A PUBLISHER FOR THE CONTENTS OF ADVERTISING	7
II. THE COURT OF APPEALS IMPROPERLY FOUND THE PUBLISHED ADVERTISEMENT TO HAVE PROXIMATELY CAUSED THE CRIME	12
CONCLUSION	16

TABLE OF AUTHORITIES

Cases:	Page
Bigelow v. Virginia, 421 U.S.809, (1975)	9
Braun v. Soldier of Fortune, 968 F.2d 1110 (11th Cir. 1992)	1,3,6,11
Eimann v. Soldier of Fortune Magazine, Inc., 880 F.2d 830 (5th Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990)	2,10,16
Federal Trade Commission v. Flotill Products, 389 U.S. 179 (1967)	2
Glus v. Brooklyn Eastern Terminal, 359 U.S. 231, 232, (1959)	4
Gertz v. Robert Welch,, Inc., 418 U.S. 323 (1974)	6,8,10
Montana Mining Company, Limited v.St. Louis Mining and Milling Company of Montana, 204 U.S. 204 (1907)	4
New York Times v. Sullivan, 376 U.S. 254 (1964)	6,8
Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S.376, 388 (1973)	8,9
Rosinek v. Cox Enterprises, Inc., 166 Ga. App. 699 (1983)	7,13,14,15
Time, Inc. v. Hill, 385 U.S. 374, 389 (1967)	10,11
Waterman Steamship Corp. v. U.S., 381 U.S. 252, 258 (1965)	2

INTEREST OF THE AMICUS CURIAE

The National Rifle Association of America (NRA) is a New York not for profit corporation. It was founded in 1871 by former officers of the Union Army with the purpose of promoting rifle marksmanship. Currently the NRA has 2.96 million members.

NRA publishes several periodicals for the benefit of its members, including *American Rifleman*, *American Hunter*, *InSights* for junior members, and *Shooting Sports USA* for competitive shooters. Each of these publications is distributed to members in each judicial circuit of the United States. Each of these publications features articles of special interest to our members, such as information on political issues of interest to its members, advice on hunting, marksmanship techniques, and evaluations of products. Each of these publications derives revenue from the sale of advertising space. Most of this advertising space is purchased by manufacturers, distributors, or retail vendors of firearms, firearms accessories, hunting equipment, and related outdoor items, such as pickup trucks and utility vehicles.

The Court of Appeals for the Eleventh Circuit has held that ". . . the First Amendment permits a state to impose upon a publisher liability for compensatory damages for negligently publishing a commercial advertisement where the ad on its face, and without the need for investigation, makes it apparent that there is a substantial danger of harm to the public." *Braun v. Soldier of Fortune*, 968 F.2d 1110 (11th Cir. 1992), at 1119.

This standard threatens the NRA as a publisher. Before accepting any advertising, it would be required

to guess how a jury might assess whether the ad, on its face, clearly indicates a substantial danger of harm to the public. NRA will lose revenue because a prudent publisher must deny advertising which is remotely questionable. This standard threatens the NRA as a political entity. The revenue from advertisers helps defray the cost of publishing political communication with its members. This standard threatens the members of NRA. If their publications are closed down, they will lose their collective voice.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ of certiorari because there appears to be a conflict between the Circuit Courts on a question which involves the rights of publishers under the First Amendment. In such case, it is appropriate for the Supreme Court to grant certiorari to resolve the conflict. *Waterman Steamship Corp. v. U.S.*, 381 U.S. 252, 258 (1965); *Federal Trade Commission v. Flotill Products*, 389 U.S. 179 (1967).

The Fifth Circuit, in *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830 (5th Cir. 1989), cert. denied, 493 U.S. 1024 (1990), reached the following conclusion:

> The standard of conduct imposed by the district court against SOF is too high; it allows a jury to visit liability on a publisher for untoward consequences that flow from his decision to publish any suspicious, ambiguous ad that might cause serious harm. The burden on a publisher to avoid liability from suits of this type is too great: he must reject all such advertisements.

> The range of foreseeable misuses of advertised products and services is as limitless as the forms and functions of the products themselves. Without a more specific indication of illegal intent than Hearn's ad or its context provided, we conclude that SOF did not violate the required standard of conduct by publishing an ad that later played a role in criminal activity.

As the *amicus* reads this case, the Fifth Circuit holds that there must be illegality on the face of the ad before a publisher could be found liable for the contents of advertising.

In the instant case the Eleventh Circuit has explicitly decided to impose a mere negligence standard for publisher liability. In its decision the Court concluded:

> ". . . that the First Amendment permits a state to impose liability for compensatory damages for negligently publishing a commercial advertisement where the ad on its face, and without the need for investigation, makes it apparent that there is a substantial danger of harm to the public." *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (11th Cir. 1992), at 1119.

There is an apparent conflict between the courts on the question of publisher liability. The approach of the Eleventh Circuit is at variance with the decisions of this Court, and establishes an ambiguous standard which would inhibit both commercial speech and the core speech for which commercial speech pays.

This Court should also grant certiorari because the question of publisher liability is important and recurring. *Glus v. Brooklyn Eastern Terminal*, 359 U.S. 231, 232, (1959). See also, *Montana Mining Company, Limited v. St. Louis Mining and Milling Company of Montana*, 204 U.S. 204 (1907).

Advertising is pervasive in American society. It informs us of products and services. It helps to shape consumption. By informing the public of the utility of goods and services, it assures continued employment for those who work in every industry in the nation. Questions concerning the liability of publishers for the advertisements of third parties are important, and will recur.

Publishing, too, is pervasive. The communications industry conveys essential information to us and is the medium for the democratic dialogue on essential matters in our national life. It entertains us. It informs us on matters which, if of less weight, such as hobbies, are no less vital to us. Questions concerning the liability of publishers to third parties for the content of advertising are important and will recur.

This Court has jurisdiction under 28 U.S.C. 1254(1) to grant certiorari in this case.

STATEMENT OF THE CASE

I. Factual Background

The survivors of a murder victim have sued *Soldier of Fortune* magazine. They claim that the magazine negligently printed an advertisement for personal services through which participants in the murderer conspiracy recruited a co-conspirator. They claim,

therefore, that the advertisement proximately caused the murder.

The ad, placed by Michael Savage, read as follows:

> GUN FOR HIRE: 37 year old professional mercenary desires jobs. Vietnam veteran. Discrete and very private. Body guard, courier, and other special skills. All jobs considered. Phone (615) 436-9785 (days) or (615) 436-4335 (nights), or write: Rt. 2, Box 6832 Village Loop Road, Gatlinburg, TN 37738.

Savage has testified that he wrote the ad with the intent of soliciting lawful employment. He received some responses which were legitimate offers, but others were solicitations for him to commit crimes.

The Court of Appeals noted that in late 1984 or early 1985, Bruce Gastwirth began seeking to murder his business associate, Richard Braun. This was several months, at least, *before* the ad was first printed in *Soldier of Fortune*. At some point, John Horton Moore joined in the scheme to kill Braun. Together, they tried three times to kill Braun. Then they read the ad. In August of 1985, they enlisted Savage as an accomplice in their scheme.

On August 26, 1985, Sean Trevore Doutre shot Braun while Braun was driving down his own driveway. Moore and Savage were with Doutre, but it is not clear what role Savage played in the murder.

II. Proceedings Below

Respondent Michael Braun is the son of Richard Braun. He was wounded in the attack which took his father's life. Respondent Ian Braun is Michael's brother. They sued petitioner *Soldier of Fortune* in

the United States District Court for the Middle District of Alabama. They claimed that SOF was negligent when it published the personal service ad because the conspirators read the ad and recruited Savage into the murder scheme. Because Savage was a co-conspirator, they claim that the ad proximately caused the death of their father and the injuries to Michael.

The District Court, after a jury trial, entered judgment for the plaintiffs. Petitioner appealed to the Court of Appeals for the Eleventh Circuit. The decision of the Court of Appeals is reported at 968 F.2d 1110 (11th Cir. 1992).

The Court of Appeals rejected the malice standard for publisher liability which was established in *New York Times v. Sullivan*, 376 U.S. 254 (1964). Instead, it held that publishers may be liable by a showing of mere negligence. It cited, as authority for applying the negligence standard, *Gertz v. Robert Welch,, Inc.*, 418 U.S. 323 (1974). Applying the Georgia negligence standard, the Court concluded:

> Based upon the foregoing authorities, we conclude that the First Amendment permits a state to impose upon a publisher liability for compensatory damages for negligently publishing a commercial advertisement where the ad on its face, and without the need for investigation, makes it apparent that there is a substantial danger of harm to the public. *Braun*, supra, at 1119.

With respect to the issue of proximate cause, the Court found that "... the jury had ample grounds

for finding that SOF's publication of Savage's ad was the proximate cause of appellees' injuries. It added:

> Georgia law recognizes that, "(g)enerally, the intervening criminal act of a third party, without which the injury would not have occurred, will be treated as the proximate cause of the injury, superseding any negligence of the defendant. . ." *Rosinek v. Cox Enterprises, Inc.*, 166 Ga. App. 699, 700. If, however, the criminal act was a reasonably foreseeable consequence of the defendant's conduct, the causal connection between that conduct and the injury is not broken. Id.; see also, *Craine v. U.S.*, 722 F.2d 1523, 1525 (11th Cir. 1984)." We have already held that the language of Savage's ad should have alerted a reasonably prudent publisher to the clearly identifiable unreasonable risk that Savage was soliciting violent and illegal jobs. It follows that a reasonable jury could conclude that the criminal act that harmed appellees was reasonably foreseeable and, accordingly, that the chain of causation was not broken.

DISCUSSION

I. THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS ESTABLISHED AN AMBIGUOUS THRESHOLD TEST TO IMPOSE LIABILITY ON A PUBLISHER FOR THE CONTENTS OF ADVERTISING

The decision in this case imposes liability on a publisher ". . . where the ad on its face, and without the need for investigation, makes it apparent that there is a substantial danger of harm to the public." We

believe that this standard is not consistent with the First Amendment decisions of this Court.

The Court arrived at this conclusion after examining the decisions in *New York Times Co. v. Sullivan*, supra, and *Gertz v. Robert Welch, Inc.*, supra. The lower court stated:

> In *Gertz*, supra, at 346, the Court held that, as long as a state does not impose liability without fault, it may constitutionally hold a publisher liable for "defamatory falsehood injurious to the reputation of a private individual." In light of the fact that the Court has found that a negligence standard satisfies the First Amendment's concern for the noncommercial, core speech at issue in *Gertz*, we see no constitutional infirmity in Georgia tort law holding publishers liable under a negligence standard with respect to the commercial advertisements they print. Cf. *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, supra, (newspaper violated anti-discrimination ordinance where ad implied advertiser was "*likely* to discriminate against women in his hiring decisions") (emphasis added).

The Court of Appeals felt that the decision of this Court in *Pittsburgh Press* was sufficiently analogous, with a parenthetical explanation, to lend support to its decision. The *amicus* believes that the Court of Appeals has misread this decision. The issue was whether government could forbid the use of sex designated employment advertisements. In a five to four decision, Justice Powell cautioned that the decision

only held that a narrowly drawn order prohibiting sex designated want ads did not infringe the First Amendment rights of the newspaper. The *amicus* notes that the decision was explicitly and self consciously confined to the facts in the *Pittsburgh Press* case, and that the commercial speech involved was overtly illegal. We find nothing in this decision to justify imposing liability on a publisher for mere negligence.

In *Bigelow v. Virginia*, 421 U.S.809, (1975), the state had prosecuted a publisher for advertising the availability, in another state, of abortions. In his decision Justice Blackmun observed:

> The strength of appellant's interest was augmented by the fact that the statute was applied against him as publisher and editor of a newspaper, not against the advertiser or a referral agency or a practitioner. The prosecution thus incurred more serious First Amendment overtones. Id. at 828.

This dictum implies a higher degree of protection for the publisher of an advertisement, as opposed to the advertiser. The Court of Appeals felt that this higher degree of protection could be accomplished by a "modified" negligence standard. Under this standard, the publisher is not required to investigate beyond the face of the ad. But what must the publisher look for on the face of an advertisement?

The Court of Appeals held that the publisher must look to see if the ad has a "clearly identifiable, substantial, risk of harm to the public." We believe that this decision offends the First Amendment. We quote

from Justice Brennan's opinion in *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967):

> A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.

What manner of harm must appear on the face of the ad for a publisher to be liable? There are few goods and services available to the public whose benefits are not accompanied by risks. Different individuals evaluate the risks and benefits differently. A publisher may think that an advertisement, on its face, poses no risk. A jury may see that same ad as posing a substantial risk of harm to the public. For example, a "personals" advertisement seeking romantic companionship might be seen by a jury as a risk of the spread of communicable and deadly diseases, which would be a "substantial danger of harm." The standard is entirely subjective, and too ambiguous for any publisher to guide his conduct by it.

In *Gertz* the publisher was also the author of the disputed material. The issue was defamation. In defamation the harm does not come through an improbable causal chain, but merely by publication. Under such circumstances it is not ambiguous to speak of substantial risk of harm to one's reputation. And where the author is the publisher, it is not unjust to impose a mere negligence standard.

There is a conflict between the Circuits. In *Eimann*, supra, the Fifth Circuit imposed a standard which we read as requiring a showing of illegality on the face of the ad before a publisher can be held liable for

the contents of advertising. In *Braun* the Eleventh Circuit imposed a standard of mere negligence. The *amicus* believes that the Fifth Circuit standard is more closely congruent with the First Amendment decisions of this Court.

Advertising is commercial speech and is protected by the First Amendment. However, it loses that protection under certain circumstances. We believe that the decisions of this Court indicate that commercial speech, to lose its protection, must present the clear and present danger of an imminent, criminal act. It is true that this would permit abuses. Justice Brennan in *Time, Inc. v. Hill*, supra, at 388, quoted from James Madison, in 4, *Elliot's Debates on the Federal Constitution*, 571 (1846 ed.). We quote, at greater length:

> Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press. It has accordingly been decided, by the practice of the states, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits.

The *amicus* is a publisher. Much of what the *amicus* publishes is core speech, which deserves the highest level of protection. If the decision of the Eleventh Circuit be left intact, the *amicus* would lose considerable revenue, and would be required to curtail its publishing activity. The decision of the Eleventh Circuit places a burden upon us which we must regard as unbearable.

Publishers can meet a duty to avoid advertising which, on its face, clearly and unambiguously proposes a crime. This is an objective standard. Publishers can avoid such conduct. Publishers cannot meet a duty to avoid advertising which a jury might find had posed "a substantial danger of harm to the public." Under such a standard no limits whatsoever can be placed upon liability based upon a "substantial danger of harm to the public." Since the revenue from advertising pays much of the cost of core speech, core speech would be inhibited if such a standard were imposed. Accordingly, the *amicus* requests this Court to grant the petition for a Writ of Certiorari to the Court of Appeals for the Eleventh Circuit.

II. THE COURT OF APPEALS IMPROPERLY FOUND THE PUBLISHED ADVERTISEMENT TO HAVE PROXIMATELY CAUSED THE CRIME

We recognize that petitioner has not raised the issue of proximate cause as such, and that proximate cause in and of itself does not present a federal question. Nevertheless, as petitioner has noted (Petition, at 18 n. 40), the way proximate cause was treated in this case trenches upon First Amendment concerns. If circumstances as remote as Braun's murder can be ascribed to the publisher of a personal services ad, all publishers are in serious danger, and their First Amendment rights are threatened.

The Court of Appeals found that the jury had ". . . ample grounds for finding SOF's publication of Savage's ad was the proximate cause of appellees' injuries." Further, it held that the pre-existing conspiracy of Moore and Gastwirth, and the intervening act of Doutre, did not supersede any negli-

gence on the part of *Soldier of Fortune* for publishing Savage's ad.

The Court noted that the chain of causation is held to be broken, under Georgia law, by an intervening criminal act. However, in this case, it decided that the chain had not been broken. In support of this portion of the decision, it quoted dictum from the decision in *Rosinek v. Cox Enterprises, Inc.*, 166 Ga. App. 699 (1983).

In *Rosinek* the plaintiff had been absent from her home for several days. During that time newspapers accumulated in her yard because she had not asked to have delivery suspended. Her home was burglarized. She had been a subscriber to the newspaper on the weekends, but not during the week. However, the newspaper decided to give her a complimentary daily subscription, starting about the time that she left her home. Accordingly, newspapers accumulated more rapidly than they would otherwise have accumulated. At trial, an expert witness testified that an accumulation of newspapers can be an inducement to burglary by informing a potential burglar that no one is home.

The *Rosinek* court noted:

> . . . the accumulation of weekend papers alone might have been sufficient to alert a would-be-burglar to the possibility that the house was unoccupied and therefore an easy mark. Thus where the homeowner had made no arrangement for the weekend newspapers to be picked up, the burglary might have taken place even had the additional newspapers not been left in the yard. Indeed, it

> might have taken place even if there had been no newspapers in the yard at all." Id.

When the Court of Appeals cited the dictum in *Rosinek*, it did not distinguish between the facts in that case and the facts in the instant case. It would be instructive to compare those facts.

In *Rosinek* the plaintiff had already given permission to the defendant to leave the weekend newspapers in her yard. She had failed to make any arrangement to have the weekend newspapers picked up. The burglar might have noticed the accumulation of weekend papers, and burglarized the house. He might even have burglarized it without any accumulation of newspapers. The *Rosinek* court held that under Georgia law, the defendant was not liable for the burglary because it could not have foreseen the burglary.

It is important to understand that the person delivering the newspapers must have noticed the accumulation. One may assume that the newspaper had some awareness that an accumulation of newspapers could lead to a burglary. Finally, one must assume that the newspaper could, if it wished, adopt a policy under which its deliverers would stop delivery when an accumulation was noticed. It could even have the person serving the route pick up the accumulation, as a service to customers. Yet the newspaper was not liable.

In this case, Gastwirth and Moore had already decided to kill Braun. In fact, they had made three attempts to do so. Since Braun was killed by Doutre, rather than Savage, the murder might have happened just as it did, even if *Soldier of Fortune* had not

published the ad. Under the circumstances, it is unreasonable to expect that petitioner would have foreseen a pre-existing conspiracy, and would have foreseen that if it published Savage's ad, that Doutre might kill Braun. The burglary of Rosinek's house was more foreseeable, and the defendant in *Rosinek* was held not liable in that case. It is, therefore, unclear how the Court of Appeals could rely upon that case to hold that *Soldier of Fortune* proximately caused Braun's death.

Braun was murdered by Doutre. Gastwirth had formed the intent to kill Braun several months before the Savage ad was published by *Soldier of Fortune*. Gastwirth had combined with Moore to carry out the murder of Braun. Apparently, they made three attempts before they could have seen the Savage ad.

Petitioner published the advertisement in which Savage sought lawful employment. The record shows that some who saw the ad believed that Savage was offering to perform lawful services. Savage affirmed that this was his intent.

Gastwirth and Moore wanted a service which was not lawful, namely the murder of Braun. They read the ad and then they contacted Savage. They asked Savage to help and he was present when Doutre finally succeeded in killing Braun.

The intervention of Doutre, and the murder of Braun, could not have been foreseen by *Soldier of Fortune*. Petitioner could not have prevented the murder. The plan to kill Braun was under way before the ad was published. Savage, the advertiser, did not pull the trigger. There is nothing in the record to show

that Doutre would not have killed Braun but for the advertisement.

The factual issue of the proximate cause of the death of Braun scarcely intersects with the interests of the *amicus*. However, the *amicus* must observe that there is a similar remoteness between the offer of services by Savage, which was published by *Soldier of Fortune*, and the murder of Braun by Doutre. If "proximate cause" be so loosely defined, then every publisher with an insurance policy may anticipate a legion of claims whose tenuous strings of causation will be limited only by the imagination of the bar and the patience of the bench.

CONCLUSION

The Fifth Circuit in *Eimann*, and the Eleventh Circuit in the instant case, have established standards for the liability of publishers. These decisions appear to be in conflict. The standard set by the Eleventh Circuit is too broad, and to ill-defined to permit publishers any freedom in editorial decisions. This standard would apply to nationally published periodicals, and inhibit core speech. The application of "proximate cause" given by the Eleventh Circuit would be ruinous to publishers. These are important and recurring questions. Under the circumstances, the amicus respectfully request this Court to grant the petition for Writ of Certiorari to the Eleventh Circuit.

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